

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:NR:PNX:POSTF-156171-01

JWDuncan

date:

to: William Kennedy, Manager, Group 1282, M/S 4201PHX
Attn: Mark Nutter

from: Office of Chief Counsel, Phoenix
LMSB:NR, Area 4

subject: [REDACTED]
Timeliness of claim relating to Rite-Aid case

This memorandum responds to your request for assistance dated October 15, 2001. This memorandum should not be cited as precedent:

ISSUES

1. Whether the taxpayer's recent claim for refund, based on the court's opinion in Rite-Aid Corporation v. United States, 88 AFTR 2d ¶ 2001-5025 (Fed. Cir. 2001), is timely.

2. If the taxpayer's claim is timely, whether its claim is valid.

CONCLUSION

1. The taxpayer's claim is not timely.

2. Even if the claim were timely, the Service believes that the regulations which would cause the taxpayer's claim to be disallowed remain valid.

FACTS

Consistent with Treas. Reg. § 1.1502-20, the taxpayer did not claim any loss on its [REDACTED] income tax return in connection with its sale of [REDACTED] to [REDACTED]. The Service and the taxpayer subsequently executed a Form 872, agreeing to extend the statute of limitations for this return to [REDACTED] pursuant to I.R.C. § 6501(c)(4)(A). The limitations period for this return was never extended beyond this date.

In [REDACTED], the taxpayer filed a claim for refund for [REDACTED], alleging that it should be allowed to deduct about \$ [REDACTED] of [REDACTED] severance payments not claimed on the return. We understand that this claim is still pending in Appeals.

On July 6, 2001, the court in Rite-Aid v. United States, 88 AFTR 2d ¶ 2001-5025 (Fed. Cir. 2001) ruled that Treas. Reg. § 1.1502-20 was not within the authority delegated by Congress under I.R.C. § 1502. The court therefore found that the regulation is invalid. A detailed discussion of the workings of Treas. Reg. § 1.1502-20 is not necessary for this discussion. It is sufficient for the purposes of this memorandum to note that this regulation greatly restricts consolidated group members from recognizing losses upon the sale of subsidiary stock.

On [REDACTED], the taxpayer sent a letter to the Appeals Officer reviewing the above-referenced claim. In this letter, the taxpayer claimed its entitlement to a loss of about \$ [REDACTED] for [REDACTED], based entirely on the determination of the Rite-Aid court that Treas. Reg. § 1.1502-20 is invalid.

The Appeals Officer has requested your comments on the taxpayer's recent assertion. In his transmittal, he has specifically requested your thoughts regarding the timeliness of the taxpayer's claim, and the validity of the taxpayer's legal argument. You have requested our opinion regarding these two matters prior to your responding to the Appeals Officer.

DISCUSSION

1. I.R.C. § 6511(c)(1) provides that when a timely agreement under § 6501(c)(4) is made within the period for filing a claim for refund, the period for filing a claim for refund expires six months after the expiration of the period in which an assessment may be made pursuant to the agreement. In the present case, since the parties agreed to extend the limitations period to [REDACTED], the period for filing a claim for refund expired on or about [REDACTED]. Therefore, the taxpayer's recent assertions are untimely, unless they somehow relate back to its prior, timely claim filed in [REDACTED].

In United States v. Andrews, 302 U.S. 517 (1938), the Supreme Court held that an amendment to a claim which merely makes matters more definite is permissible. "On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and

invoke action requiring examination of other matters not germane to the first claim." United States v. Andrews at 524. The Court therefore held that the amended claim was barred by the statute of limitations. As summarized in Arnold v. United States, 90-1 USTC ¶ 50,119 (Cl. Ct. 1990), and citing First National Bank of Montgomery v. United States, 280 F.2d 818 (Ct. Cl. 1960):

[T]he decided cases make it plain that where a timely claim for a tax refund asks for the repayment of a specific sum upon a specific ground, the claim cannot be amended after the expiration of the period of limitation so as to ask for a refund on a ground different from that asserted in the original claim.

See also Angle v. United States, 996 F.2d 252 (10th Cir. 1993), in which the court held that it lacked jurisdiction over issues raised in the taxpayer's untimely third amended claim for refund, even though the original claim and other amendments were timely.

In light of the above, we believe that the taxpayer's recent request for a refund ~~exceeding~~ that originally requested, and on grounds not raised prior to the expiration of the deadline for filing claims under § 6511(c)(1), is untimely. Because such claim is untimely, ~~a court would not have jurisdiction over this issue if the taxpayer were to file a refund suit under § 7422.~~

2. The Service continues to believe that Treas. Reg. § 1.1502-20 represents a valid exercise of its authority. As evidenced by its Petition for Rehearing En Banc (see 2001 TNT 176-20, a copy of which is attached), the Service continues to contest the court's ruling. The Service's position is stated in great detail in its Petition. Briefly, it believes that the court's conclusion that the regulation's duplicated loss rule is unrelated to consolidated return filing overlooks the effect of the consolidated return regulations upon the computation of a group parent's basis in its members' stock, and the effect of that basis in determining the gain or loss of the group upon the sale of the member stock. Furthermore, it appears that the court misperceived the rationale of the duplicated loss rule, which is premised on the concept of clear reflection of income, a concept central to the Secretary's regulatory authority under I.R.C. § 1502. The Service therefore continues to believe in the validity of Treas. Reg. § 1.1502-20, and is actively seeking to overturn what it believes was an incorrect ruling of the Circuit Court for the Federal Circuit.

Please be advised that we consider the statements of law expressed in this memorandum to be significant large case advice.

We therefore request that you refrain from acting on this memorandum for ten (10) working days to allow the Division Counsel (Large and Mid-Size Business) an opportunity to comment. If you have any questions regarding the above, please contact the undersigned at (602) 207-8052.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

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By: _____
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Attorney

CC: Division Counsel (Large and Mid-Size Business)